Lawrence B Masuni @ Fairus bin Abdullah & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS Q-05–105 OF 2004(A) AND Q-05–105 OF 2004(B)
LOW HOP BING, SYED AHMAD HELMY AND MOHAMED APANDI JJCA
30 NOVEMBER 2010

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Criminal Law — Murder — Intention to murder — Actual infliction of further injuries upon deceased — Whether injuries inflicted knowingly upon deceased groaning in pain indicates common intention

D

Evidence — Confession — Co-accused's confession — Confession used in support of other evidence — Whether co-accused's information could be foundation of conviction — Evidence Act 1950 s 30(1)

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The appellants were charged with the murder of Willy Tuah Ching Chat ('the deceased'). Both the appellants were consuming liquor with a group of people and among them were, PW11 and PW13. Both PW11 and PW13 had stated the sequence of events relating to the sequence of events which was corroborated by PW14. The first defendant was seen by the group of people riding the deceased's scooter and subsequently, PW14 with the second appellant went to the first appellant's house who arrived a short while later with the deceased's scooter. The first appellant informed PW14 that he had hit the deceased and brought the first appellant and PW14 to a place where the deceased was lying down with his face downward still breathing and groaning. PW14 mentioned that he saw both the appellants using a piece of wood and hit the deceased's head repeatedly. PW14 stated that the deceased had stopped groaning after being hit and he testified that he could postively identify the body lying on the road at that moment belonging to the deceased. PW14 also said that the first appellant was seen taking out a handbag from the deceased's scooter and the second appellant removing a neckless from the deceased. The first appellant was seen by PW14 throwing the handbag and paper contents into a river nearby. All relevant exhibits in the form of photograph of the deceased was identified by PW14 in the court. The pathologist upon conducting a post mortem on the deceased mentioned that the deceased died due to severe head injures. A goldsmith ('PW9') identified the first accused as the person who sold jeweleries which belonged to the deceased. The prosecution had made out a prima facie case against both the appellants. Both the appellants gave an unsworn statements from the dock. The first appellant denied that he assaulted the deceased with a plank causing the death of the

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deceased. The second appellant denied hitting the deceased, but mentioned that PW14 had hit the deceased with a piece of wood. Both the appellants argued respecetively, inter alia, that: (i) the trial judge erred in law and fact for accepting the evidence of PW14 who was an accomplice whose evidence must be corroborated; (ii) the prosecution failed to prove the element of common intention beyond reasonable doubt; (iii) there was no proof that the second appellant caused the fatal blow against the deceased; and (iv) the prosecution failed to clarify the contradiction in the cautioned statement of the first appellant. However, it was submitted by the prosecution that the inculpatory part of the cautioned statement of the first appellant that related to the admission that the second appellant hit the deceased with a plank was a confession which may be used against him.

Held, dismising the appeal:

(1) The cautionend statement (P64) by the first appellant that stated that the second appellant hit the deceased with a plank was clearly a confession and was evidence that may be used against the first appellant. The learned trial judge was correct in submitting that the nature of the wounds inflicted was such that whoever inflicted the blows to the deceased's head must have intended to kill the person (see paras 26 & 28).

(2) The unsworn statement by both the appellants against the whole of the evidence adduced rejected their respective defences which did not create any reasonable doubt. There was no error in the learned trial judge's finding that the appellants' defences were one of doubt and laced with inconsistencies that was insufficient to create any doubt (see paras 35–36).

(3) Although s 30(1) of the Evidence Act 1950 allows the court to take the confessions of a co-accused's information in consideration it is not proof and can only be used in support of other evidence. In essence, confession per se of a co-accused cannot be made the foundation of conviction. Hence, upon scrutiny of the evidence adduced as discernible from the testimony of PW9, PW11, PW13 and PW14 it was clear that there was evidence as to the culpability of the second appellant for which P64 could be used as aid to support the conviction (see paras 43 & 45).

(4) The learned trial judge had correctly directed his mind to the issue of common intention and upon perusing P64 in not implicating PW14 in the hatching of any idea of finishing of the deceased or in actual infliction of further injuries upon the deceased. The acts of both accused taking turns in hitting the back of the deceased's head with a piece of plank knowingly that the deceased was already lying down groaning in pain quite clearly indicated common intention on the appellants part in snuffing out the life of the deceased (see para 49).

[Bahasa Malaysia summary

Perayu-perayu dituduh membunuh Willy Tuah Ching Chat ('si mati'). Kedua-dua perayu sedang minum arak dengan beberapa orang dan di antara mereka adalah, PW11 dan PW13. Kedua-dua PW11 dan PW13 telah menyatakan rentetan kejadian berkaitan dengan rangkaian kejadian yang disokong oleh PW14. Defendan pertama dilihat oleh sekumpulan orang menunggang skuter si mati dan kemudian, PW14 dengan perayu kedua pergi ke rumah perayu pertama yang tiba seketika kemudian dengan skuter si mati. Perayu pertama memberitahu PW14 bahawa dia telah memukul si mati dan membawa perayu pertama dan PW14 ke suatu tempat di mana si mati tertiarap dan masih bernafas dan mengerang. PW14 menyatakan bahawa dia melihat perayu-perayu menggunakan sebatang kayu dan memukul si mati di kepalanya bertubi-tubi. PW14 menyatakan bahawa si mati telah berhenti mengerang setelah dipukul dan dia memberikan keterangan bahawa dia boleh mengenal pasti secara positif mayat yang terbaring di jalan raya pada masa itu adalah si mati. PW14 juga menyatakan bahawa perayu pertama dilihat mengeluarkan sebuah beg tangan daripada skuter si mati dan perayu kedua mengambil rantai leher daripada si mati. Perayu pertama dilihat oleh PW14 membuang beg tangan dan dokumen di dalamnya ke dalam sebuah sungai berhampiran. Kesemua ekshibit yang berkaitan dalam bentuk gambar si mati dikenal pasti oleh PW14 di mahkamah. Ahli patologi selepas membuat bedah siasat ke atas si mati menyatakan bahawa dia mati disebabkan oleh kecederaan kepala yang parah. Seorang pekedai emas ('PW9') menyatakan bahawa tertuduh pertama sebagai orang yang menjual barang-barang kemas milik si mati. Pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu. Kedua-dua perayu memberikan keterangan tidak bersumpah dari kandang saksi. Perayu pertama menafikan bahawa dia menyerang si mati dengan kayu menyebabkan kematian si mati. Perayu kedua menafikan memukul si mati tetapi menyatakan bahawa PW14 telah memukul si mati. Perayu kedua menafikan memukul si mati, tetapi menyatakan bahawa PW14 telah memukul si mati dengan sebatang kayu. Kedua-dua perayu masing-masing menyatakan, antara lain, bahawa: (i) hakim perbicaraan terkhilaf dari segi undang-undang dan fakta dalam menerima keterangan PW14 yang merupakan seorang rakan sejenayah yang keterangannya mesti disokong; (ii) pihak pendakwaan gagal membuktikan unsur niat bersama melampaui keraguan yang munasabah; (iii) tidak ada bukti bahawa perayu kedua menyebabkan pukulan yang menyebabkan kematian terhadap si mati; dan (iv) pihak pendakwaan gagal untuk menjelaskan percanggahan di dalam keterangan beramaran perayu pertama. Walau bagaimanapun, pihak pendakwaan menghujah bahawa bahagian yang membabitkan di dalam kenyataan beramaran perayu pertama yang berkaitan dengan pengakuan bahawa perayu kedua memukul si mati dengan kayu adalah pengakuan yang boleh digunakan terhadapnya.

Diputuskan, menolak rayuan:

(1) Kenyataan beramaran (P64) oleh perayu pertama yang menyatakan

bahawa perayu kedua memukul si mati dengan kayu adalah jelas pengakuan dan adalah keterangan yang boleh digunakan terhadap perayu pertama. Hakim perbicaraan yang bijaksana adalah betul dalam menghujah bahawa melihat kepada luka yang diakibatkan adalah bahawa sesiapa yang memukul kepala si mati sememangnya berniat untuk membunuh orang tersebut (lihat perenggan 26 & 28).

(2) Kenyataan tidak bersumpah oleh kedua-dua perayu terhadap keseluruhan keterangan yang dikemukakan menolak pembelaan masing-masing yang tidak menimbulkan apa-apa keraguan munasabah. Tidak ada kekhilafan di dalam penemuan hakim perbicaraan bahawa pembelaan perayu-perayu adalah diragui dan laced dengan ketidakkonsistenan yang tidak mencukupi untuk menimbulkan keraguan (lihat perenggan 35–36).

(3) Walaupun s 30(1) Akta Keterangan 1950 membenarkan mahkamah untuk mengambil maklumat pengakuan pelaku salah bersama ke dalam pertimbangan ia bukan bukti dan hanya boleh digunakan untuk menyokong keterangan lain. Pada dasarnya, pengakuan semata-mata oleh pelaku salah bersama tidak boleh dijadikan asas sabitan. Justeru, selepas meneliti keterangan yang dikemukakan seperti yang ditanggap daripada keterangan PW9, PW11, PW13 dan PW14 adalah jelas bahawa terdapat keterangan terhadap kebersalahan perayu kedua di mana P64 boleh digunakan sebagai sokongan untuk menyokong sabitan (lihat perenggan 43 & 45).

(4) Hakim perbicaraan yang bijaksana telah secara betul mengarahkan mindanya kepada isu niat bersama dan selepas meneliti P64 tidak membabitkan PW14 dalam merancang apa-apa idea membunuh si mati atau dalam menyebabkan kecederaan lanjut yang sebenar ke atas si mati. Tindakan kedua-dua perayu bergilir-gilir memukul belakang si mati di kepalanya dengan sebatang kayu dengan pengetahuan bahawa si mati telah terbaring mengerang kesakitan jelas memberikan indikasi niat bersama pada pihak perayu-perayu dalam membunuh si mati (lihat perenggan 49).]

Notes

For a case on intention to murder, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 1383.

For cases on co-accused's confession, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 865–867.

Cases referred to

Anandagoda v R [1962] 1 WLR 817, PC (refd)

Herchun Singh & Ors v PP [1968] 2 MLJ 209; [1969] 1 LNS 52, FC (refd)

Kashmira Singh v State of Madhya Pradesh AIR 1952 SC 159 (refd)

Lemanit v PP [1965] 2 MLJ 26; [1965] 1 LNS 89, FC (refd)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70; [1993] 4 CLJ 173, SC (refd)
PP v Lai Pong Yuen & Ors [1968] 1 MLJ 12 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Nordin bin Johan & Anor [1983] 2 MLJ 221, FC (refd)
Sim Ah Cheoh & Ors v PP [1991] 2 MLJ 353 (refd)

Legislation referred to
Evidence Act [IND] s 30
Evidence Act 1950 s 30(1)
Criminal Procedure Code s 180(3), (4)
Penal Code ss 302, 304

Appeal from: Criminal Trial No 47–03 of 1999 (High Court, Sibu)

Mohd Osman Ibrahim (Abdul Rahman bin Mohamad Hasmi with him) (Osman Ibrahim & Co) for the first and second appellants.
Awang Armadaya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Syed Ahmad Helmy JCA (delivering judgment of the court):

[1] Both the accused/appellants were charged with the murder of one Willy Tuoh Ching Chat (m) and the charge reads as follows:

> That you, in furtherance of the common intention of you all, on the 7th day of August 1998, between 1.30 a.m. to 6.00 a.m., at an unnamed road, off Jalan Kaka, Kampung Dato Baru, in the District of Sibu in the State of Sarawak committed murder by causing the death of one WILLY TUOH CHING CHAT (M) and thereby committed an offence punishable under Section 302 of the Penal Code read together with Section 34 of the same code.

[2] At the end of the prosecution's case the learned trial judge found that the prosecution had made out a prima facie case against both accused and called upon them to enter their defence as prescribed by s 180(3) of the Criminal Procedure Code. According to s 180(4) of the Criminal Procedure Code 'a prima facie case' is made out against the accused where the prosecution has adduced credible evidence proving each and every ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[3] At the conclusion of the trial, the learned judge after evaluating all the evidence adduced found that the prosecution had proved its case beyond reasonable doubt and found both the accused guilty as per the charge and convicted them accordingly and passed the mandated sentence of death.

[4] This is both the accused appeal against conviction and sentence.

[5] The brief facts of the case as appreciated by the learned trial judge was that both the accused were drinking liquor with nine or ten other persons in Kampong Bandong on the evening of 6 August 1998 and the early hours of 7 August 1998.

[6] At about midnight the deceased came riding a motor scooter. The first accused approached the deceased and after talking for about two to three minutes the first accused got on the deceased's scooter and they left the area and returned about 20–30 minutes later. After stopping for a while both of them again left the area. The group then left the place. The event aforesaid was related by PW11 (Frederick bin Jiri) and PW13 Eddy Syarizan bin Azman (Eddy) and corroborated by PW14 (Jormie Ryan bin Joe Menawan). PW14 who was also known as Andy together with the second accused then went to the first accused's house 'to relax' but the first accused was not home. When later the first accused returned home using the deceased's scooter, the first accused looked as if he was scared and he told PW14 that he had hit the deceased. The first accused then brought PW14 and the second accused to a dead end lane opposite Jalan Kaka in Kg Dato Baru. PW14 saw the deceased 'lying down with face downward' still breathing and groaning. PW14 then saw both the accused each using a piece of plank which they got hold from the side of the road hitting the deceased's head repeatedly. According to PW14 each of the two planks was about 3 feet long and an inch thick which they threw into the bushes. It is PW14's evidence that during and after the hitting by both the accused the deceased stopped groaning.

[7] PW14 testified that he could positively identify the body lying on the road as that of the deceased because the area was bright, lighted by moonlight and street light. PW14 then saw the first accused taking out a handbag from the compartment under the seat of the deceased's scooter and the second accused taking from the deceased's neck a necklace. The three of them then went back to the first accused's house by using the second accused's motorcycle. The deceased's motor scooter was left at the scene where the deceased was assaulted.

[8] At the first accused's house, the first accused opened the handbag and took out cash of RM130, two rings, one bank card and some papers. The first accused told PW14 that he and the second accused were going to test the bank card and both accused left the house. Whilst both accused were leaving the house PW14 saw the first accused throwing the handbag and paper contents into the Rejang River behind the first accused's house. Soon thereafter both the accused returned and the first accused said something to the effect that the bank card was stuck. Both the accused and PW14 then went to sleep.

[9] The next morning the first accused divided the RM130 among the three of them whereby the first accused kept RM50 while PW14 and the second accused were each given RM40. The two gold rings and necklace were kept by the first accused. All relevant exhibits in the form of photographs of the deceased, the deceased's motor scooter, the dead end lane, the second accused's motor cycle and the two planks, and gold rings and necklace were identified by PW14 in court.

[10] PW9 (Pau Kiu Mui) who operated a goldsmith shop identified the first accused as one of two male 'Malays' who came to his shop and sold him the two gold rings and the necklace.

[11] The pathologist PW3 (Dr Myint Soe) who conducted the post mortem and its report identified the three more serious wounds namely the 5 x 1 x 1cm wound on the lower jaw with fracture of the jaw bone; four lacerated wounds, the largest being 10 x 2 x 1cm on the back right side of head with a fracture of the skull; and two lacerated wounds the largest being 3 x 2 x 1cm on the back left side of the head with fracture of the skull. The cause of death according to PW3 was severe head injuries and the four lacerated wounds and two lacerated wounds mentioned above were the probable cause of death.

[12] Being satisfied that a prima facie case has been established by the prosecution the learned trial judge ordered both the accused to enter their defence.

[13] Both the accused upon being called to enter their respective defence elected to give an unsworn statement from the dock.

[14] The first accused in his unsworn statement denied culpability to the charge. He denied that he was the one who assaulted the deceased with the plank that caused the death of the deceased although admission was made that the earlier beating was done to ward off the sexual advances of the deceased. In advancing his version the first accused stated that he started to get angry and punched the deceased on the face because of the deceased's refusal to respond to the first accused's request to go back and insistence to wait for a while.

[15] On the aspect of the beating meted out against the deceased the crucial part of the first accused unsworn statement reads as follows:

> After I punched him on his face Ah Chai (the deceased) fell down to the ground on the tarred road. He got up and tried to fight back. He pulled at my shirt and tried to fight me. I pushed him away. I noticed a piece of wood nearby. He tried to fight with me, then I did not notice whether I hit him front and back. I just hit him. After hitting Ah Chai once or twice Ah Chai fell to the ground again. I hit Ah Chai again

with a piece of wood I had used earlier at his back. After hitting him on his back I felt nervous. Then I started the engine of the scooter and went to look for my friend.

[16] Thereafter the first accused went back to his house where he met the second accused and PW14. He then told PW14 that he had quarrelled with Ah Chai and asked them what he should do. He then brought PW14 and the second accused to the place where Ah Chai had fallen and all three of them had a closer look at Ah Chai who was holding his head with both hands and groaning in pain and his right leg uplifted. He then went to Ah Chai's scooter when he heard the sound of hitting and Noorha's (the second accused) voice talking to Andy and asking why he was hitting Ah Chai again. He turned around and saw Andy holding a piece of wood which he thereupon took away from Andy's hand and threw it away.

[17] The second accused in his unsworn statement confirmed accompanying the first accused and PW14 to the dead end road where the deceased's body was lying. When the first accused went to the deceased's scooter PW14 picked up a piece of wood and hit the deceased two or three times. He pushed PW14 away and asked why he hit the deceased. The first accused then came back and took the piece of wood from PW14's hand before throwing it away and going back to the scooter. When the second accused asked PW14 as to why he hit the deceased again PW14 replied that the deceased would cause them trouble as he knew who PW14 was and where he lived. According to him PW14 then asked him to relax and assured him that nothing would happen. PW14 then asked the second accused to take the gold chain from deceased's neck before going home.

[18] Learned counsel for the first appellant advanced five grounds in his memorandum of appeal against both conviction and sentence which can be summarised as follows:

(a) First ground: the learned trial judge erred in law and in fact in a finding that the prosecution had made out a prima facie case when it was against the weight of evidence.

(b) Second ground: the learned trial judge erred in law and fact for accepting the evidence of PW14 (Jormie Ryan bin Joe Menawan) who was an accomplice in order to link with the first appellant with the charge of murder.

(c) Third ground: the learned trial judge erred in law and fact in finding the first appellant guilty when the prosecution had failed to prove all the ingredients of the charge including the element of common intention beyond reasonable doubt.

(d) Fourth ground: the learned trial judge erred in law and fact for not considering the defence adequately.

(e) Fifth ground: the learned trial judge had misdirected himself in the circumstances and development of the case for not convicting the first appellant of a lesser charge justifiable under s 304 of the Penal Code which had caused a failure of justice.

[19] The second accused through his learned counsel also advanced five grounds in his memorandum of appeal which can be summarised as follows:

(a) PW14 is an accomplice whose evidence must necessarily be corroborated.

(b) The prosecution failed to prove the element of common intention beyond reasonable doubt.

(c) There was no proof that the second accused caused the fatal blow.

(d) The prosecution failed to clarify the contradiction in the cautioned statement (exh P64) of the first accused.

(e) The second accused's explanation in his cautioned statement is consistent with his innocence.

[20] In his oral submission before us, learned counsel for the first accused informed us that the first, second and third grounds of appeal will be taken together for submission.

[21] In essence the challenge mounted by him is whether the cautioned statement (P64) which was not challenged by the previous counsel of the first accused was properly admitted; whether the learned trial judge erred in accepting the evidence of PW14 who was an accomplice and whether the ingredients of the charge including the element of common intention has been proven by the prosecution beyond reasonable doubt.

[22] On the challenge against the cautioned statement P64 the outstanding and peculiar feature is that it comprises both exculpatory and inculpatory parts and it was introduced by the defence.

[23] Though it is trite that a purely exculpatory or self serving statement is not evidence of the facts stated and the court ought not to take such statement into account for ordering an acquittal and discharge — see *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70; [1993] 4 CLJ 173 — nevertheless the question arises whether the court can rely on the inculpatory part of the cautioned statement P64 to found culpability on the accused.

[24] The learned DPP in his written submission urges the court to find that the inculpatory part of the cautioned statement P64 of the first accused that relates to the admission that the second accused hit the deceased with a plank is a confession which may be used against him and in support thereof drew our attention to the Federal Court case of *Lemanit v Public Prosecutor* [1965] 2 MLJ 26; [1965] 1 LNS 89 where the Federal Court held that is could be used to implicate the accused if it was a confession.

[25] The Federal Court approved the test laid down in *Anandagoda v R* [1962] 1 WLR 817 and held:

> Applying this test (ie the objective test whether a statement amounts to a confession) to the statement made by the appellant in the case before us that although it contains protestations of innocence in some respects, *it does contain taken as a whole without reference to extrinsic facts, an admission suggesting the inference that he committed the offence for which he had been arrested and on which he was subsequently charged*. He clearly admits exploding a bomb at a place in Singapore. It is true that he states that he exploded it at a place where there were no people. This shows that he had no intent to cause injury to persons but there is nothing in the statement which indicates that he had no intention to cause injury to property. It therefore seems to us that the statement as a whole suggests the reference that he exploded a bomb at a place in Singapore with intent to damage property.

[26] We are persuaded and accept the submission of the learned DPP and hold that the statement of the first accused in P64 that the second accused hit the deceased with a plank was clearly a confession and is evidence that may be used against the first accused.

[27] Learned counsel for the first accused submits that the contents of the cautioned statement P64 only goes to show the act and omission of the first accused being limited to the extent of the commission of an offence under s 304 and/or causing grievous hurt under the relevant section of the Penal Code. It is learned counsel's submission that the contents of P64 shows that the fight between the first accused and the deceased was sudden and unmeditated and the first accused accidentally taking a plank found on the road and hitting the deceased at the back of the head. Notwithstanding the hitting the deceased was still alive which clearly negatives the intention to kill. It is further contended that the testimony of the pathologist PW3 lends support that there was the absence of intention to kill by his testimony that the injury at the back of the head was not the imminent cause of death. We have given serious consideration to learned defence counsel's submission and we find that the learned trial judge did address his mind to the submission of intention aforesaid in his finding that there was common intention. At p 761 of the record of appeal the learned trial judge stated:

> ... it appears to me quite clear, that based on the accused acts of taking turns in hitting the deceased's head with a piece of plank while the deceased was then undisputedly still alive there was common intention between the first and second accuseds in the infliction of the further injuries upon the deceased with the intention of causing death, or in any case causing injuries with the intention of causing such bodily injuries as each of the two accused knew to be likely to cause the death of the deceased. And in such circumstances even if based solely on the evidence of PW14 seeing the two accuseds taking turns in hitting the deceased's head, what else could the natural consequence be of such hitting by each of the two accuseds except to snuff the life of the deceased?

[28] The learned trial judge emphasised that the nature of the wounds inflicted was such that whoever inflicted those blows must have intended to kill the person on whom they were inflicted and we could not agree more with the learned judge.

[29] We now come to the issue of whether PW14 was an accomplice that necessitated corroboration of his evidence.

[30] The thrust of both learned counsel's for the accused on this issue was that PW14 was an accomplice whose evidence necessitates corroboration or warning before it could be accepted. Both counsel strenuously argued that the following facts show the status of PW14 as an accomplice:

(a) He was at the scene of the crime and he was the one who introduced the deceased to the first accused.

(b) He was the one who followed both the accused to the scene.

(c) He did not report to the police/anybody else after the incident.

(d) He agreed and accepted his share of RM40 out of the RM130 taken from the deceased.

(e) He knew that the first accused had thrown the deceased's bag into the Rejang River behind his house.

[31] The learned trial judge in evaluating the evidence before him found that PW14 was not an accomplice. The learned judge in addressing and determining the question in the negative stated in his judgment at pp 735–736 of the appeal record:

> The contention that PW14 is an accomplice would also appear to be untenable. As pointed out by the learned deputy public prosecutor and based on the evidence, PW14 merely followed the first and second accuseds to the crime scene. PW14 witnessed but did not participate in the infliction of the injuries found on the deceased. This fact would appear undisputed. As contended by the learned deputy public prosecutor, PW14 was not a participes criminis concerning the charge

> against the accuseds. It would appear tenable the contention that PW14 was not an accomplice in the context of the relevant principles enunciated in *Re Soo Leot* [1956] MLJ 54 … In any case, there appears to be nothing in fhe evidence including those elicited during cross-examination, to indicate that PW14 took part or even intended to participate or shared common intention with the first and the second accused in the infliction of the injuries that caused the death of the deceased. In fact there was no evidence at all to indicate that PW14 intended to inflict, and neither did he inflict any harm or injury at all upon the deceased.

[32] The learned trial judge also adverted to the first accused's cautioned statement P64 and P67 in support of his finding that PW14 was not an accomplice when he stated in his judgment at p 749 of the record of appeal:

> But again the point remains that there is nothing in P64 which is at all indicative of PW14's intention to participate or actual participation in the infliction of any of the injuries sustained by the deceased. The fact — the non mentioning in either P67 or P64 of PW14's participation in the hitting of the deceased — substantially destroys the contention that PW14 is an accomplice.

[33] In arriving at the finding aforesaid the learned judge was of the view that the evidence of PW14 was not inherently incredible for acceptance. He dismissed the defence allegation that it was PW14's idea to finish off the deceased and that he was the person who actually hit the deceased. The learned judge reasoned, which we agree, that had there been any truth in the line of defence as alleged in their unsworn statement, it was both logical and natural for the first accused to have stated it in his cautioned statement P64.

[34] We have scrutinised the evidence adduced which led to the learned trial judges's finding aforesaid and we find that there is no error in his finding which warrants appellate interference.

[35] The learned judge in evaluating the unsworn statement of both accused against the whole of the evidence adduced rejected their respective defences which did not create any reasonable doubt. He found that the defence being one of denial and laced with inconsistencies is insufficient to create any doubt.

[36] We are of the view that there was no error in the trial judge's decision in rejecting the defence of denial. The inconsistencies in their unsworn statements and tested against the totality of the evidence adduced is clearly insufficient to create a doubt much less a reasonable doubt. As was stated by Yusoff Mohamed J (as he then was) in *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ

324 'a mere denial without other proof to reasonably dislodge the prosecution evidence is not sufficient'. A

[37] We now turn our attention to the issue of whether P64 could be used to implicate the second accused. B

[38] P64 is the cautioned statement of the first accused which was tendered by the prosecution without any objection by the defence.

[39] The relevant passage in P64 which concerns and makes mention of the second accused to the alleged crime appears from line 59 at p 8 to line 9 at p 9 and is reproduced hereunder: C

> Saya bertanya kepada Norha, 'macam mana ni', Norlia cakap 'Kalau dia masih hidup nanti dia boleh cam'. 'Mahu tak mahu kena bunuh'. Saya sebenarnya bercakap dalam Bahasa Malanau dengan Norha. Apa yang kami katakana adalah lebih kurang begini 'Ijam, kubah gaya tuah bak man Ah Chai'. Norha cakap 'Mei, sih mak, mei mei binuk mak'. D
>
> Selepas itu Norha ambil satu kayu dari tempat buang sampah dan memukul muka Ah Chai saya dengar suara mengerang dari Ah Chai. Lepas itu Ah Chai tidak bergerak-gerak lagi. E

[40] The learned trial judge having found that the content in P64 pertaining to the second accused hitting the deceased with a plank is a confession which can be used against the first accused as the maker, the question arises whether it could be used to implicate the second accused. F

[41] On this score it is appropriate to advert to s 30(1) of the Evidence Act 1950 which provides: G

> When more person than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such person is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. H

[42] Section 30(1) aforesaid is in pari materia with s 30 of the Indian Evidence Act and our courts have adopted the same construction as decided by the Indian cases in that the section allows the court to take into consideration the confession of an accused implicating himself and his co-accused along with other evidence but a conviction based on such confession cannot stand — see *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221; *Sim Ah Cheoh* I

& Ors v Public Prosecutor [1991] 2 MLJ 353; *Herchun Singh & Ors v Public Prosecutor* [1968] 2 MLJ 209; [1969] 1 LNS 52.

[43] Though s 30(1) of the Evidence Act 1950 allows the court to take the confessions of a co-accused into consideration and thereby make it evidence, it is not proof and can only be used in support of other evidence. In essence confession per se of a co-accused cannot be made the foundation of a conviction.

[44] The approach to be adopted was lucidly laid out in *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12 where Ismail Khan J approved the approach taken by Bose J in *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159 in that:

> The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safety be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arises where the judge is not prepared to act on the other evidence as it stands even though, 'if believed' it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

[45] Though the accused did not raise any challenge to the admissibility of P64 nevertheless upon scrutiny of the evidence adduced as discernible from the testimony of PW9, PW11, PW13 and PW14 it is abundantly clear that there is evidence as to the culpability of the second accused for which P64 could be used as an aid to support the conviction.

[46] PW11 testified that at about midnight on 6 August 1998 the deceased stopped his motor scooter by the roadside in the Kampong Bandong area near the 'Bernas Shop'. He saw the first accused approaching and talking to the deceased before leaving the area riding pillion only to return about 20–30 minutes later before leaving the area again. PW11's evidence was similar to that of PW13 and the evidence of PW14 corroborated substantially the evidence of PW11 and PW13 as to the events that occurred at Kampong Bandong. PW14 testified that no one else other than the first accused approached the deceased. PW14 further testified that later that night the first accused returned alone to his house using the deceased's scooter looking scared and informing PW14 that he had hit the deceased. The first accused then brought PW14 and the second accused to Jalan Kampong Dato Baru in front of Jalan Kaka where there was a dead end lane. PW14 saw the deceased 'lying down with face downward' still breathing. He also heard the deceased groaning as he walked past the deceased's

body. He then gave an eyewitness account of the first and second accused taking turns hitting the deceased's head with a piece of plank which they found at the road side. According to PW14 during and after the hitting by the accused there was no more groaning from the deceased PW14 also saw the second accused taking from the deceased's neck a golden necklace and the first accused taking out two gold rings from the deceased's handbag.

[47] Aside from PW14's testimony there was the testimony of the goldsmith Pau Kih Mei ('PW9') that the first accused was one of two male 'Malays' who came to his shop at Channel Road, Sibu at 2.30pm on 8 August 1998 who sold him the two gold rings and gold necklace for RM120 and RM120 respectively.

[48] Before concluding, the challenge by learned counsel for the second accused on the element of common intention needs to be addressed. Learned counsel for the second accused submits that the evidence of PW14 that the first and second accused took turns to hit the deceased does not tantamount to the second accused having common intention to hit the deceased. That the totality of the evidence adduced and in particular to the statement in exh P64 does not tantamount to the second accused having common intention to kill the deceased more so in the light of the second accused's action of hitting the face and the front side of the deceased's face which negatives the requisite intention to kill.

[49] The learned trial judge directed his mind to the issue of common intention and after holding that the exh P64 does not implicate PW14 in the hatching of any idea of finishing off the deceased, or in the actual infliction of further injuries upon the deceased concluded that the acts of both accused taking turns in hitting the back of the deceased's head with a piece of plank knowing that the deceased was already lying down groaning in pain quite clearly indicates common intention on their part in snuffing out life from the deceased — see p 792 of the appeal record.

[50] We do not see any error in the learned judge's finding on the issue of common intention.

[51] We have scrutinised the totality of the evidence as presented and the judgment of the learned trial judge and it is our unanimous view that he had not misdirected himself on the law. He had addressed his mind, evaluated and considered the evidence of both the prosecution and the defence in great detail. He gave his reasons why he accepted and why he did not accept certain evidence before correctly arriving at his conclusion. We defer to his audio visual advantage on the evidence placed before him and there is no reason for us to

A interfere with his finding of facts. The appeal is accordingly dismissed and the conviction and sentence imposed by the learned trial judge affirmed.

Appeal dismissed.

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Reported by Mashrifah Ravendran

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